No. 997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL.,
Petitioners

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on February 23, 1961, affirming an order of the Federal Trade Commission entered against petitioners on February 24, 1959.

OPINION BELOW

The opinion of the Court of Appeals is reported at 287 F. 2d 512 and appears in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1961 and issued April 3, 1961. It appears in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Subsection 2(f) of the Robinson-Patman Amendment to the Clayton Act proscribes a *buyer's* knowing inducement or receipt of a *seller's* price discrimination which violates subsection 2(a). In a series of proceedings against sellers of automotive part and supplies, 1955 to 1959, the Federal Trade Commission and the Courts of Appeals held that prices charged petitioners and other buyers violated 2(a). The seller proceedings involved difficult and sharply litigated issues of liability. Questions as to whether the prices were within the sellers' cost justification or meeting competition defenses under the statute were not fully settled until completion of judicial review proceedings. In four cases, the Commission itself split, one Commissioner dissenting on grounds that no competitive injury cognizable under the statute had occurred.

The instant case is one of several brought under subsection 2(f) against buyers from these sellers. In the proceedings below, the Court of Appeals found that petitioners had knowledge of the illegality of these prices, six years before the Commission first ruled in the seller cases. Under criteria of this Court's controlling decision *Automatic Canteen* v. *F.T.C.*, 346 U.S. 61 (1953), this finding, to stand, must be based upon an appropriate showing of record that petitioners *knew* that these prices were injurious to competitors, *knew* that they were not cost justified, and *knew* that they were not made to meet competition, or otherwise defensible under the statute.

The question presented is whether the Court of Appeals disregarded this Court's *Automatic Canteen* decision in finding that petitioners had knowledge that prices they received from their suppliers were unlawful.

Subsidiary questions are:

1) Whether the Court of Appeals erred in failing to consider petitioners' contention that they had no knowledge that the prices might cause injury to competitors;

2) Whether the Court of Appeals failed to make a fair assessment of the whole record in finding that petitioners knew that the prices were not cost justified;

3) Whether the Court of Appeals failed to make a fair assessment of the whole record in finding that petitioners knew that the prices were not within their sellers' meeting competition defense;

4) Whether the Court of Appeals erred in failing to consider petitioners' contention that they did not know the prices were not within the statute's cooperative exemption.

STATUTE INVOLVED

This proceeding is brought under subsection 2(f) of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(f), which provides that

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

The question presented involves, as well, the prohibition against price discriminations contained in subsection 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), which provides in relevant part:

> That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

The question also involves certain justifications or exemptions from the price discrimination prohibition of the Act, including the cost justification proviso of subsection 2(a):

> Nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; . . .

the meeting competition proviso of subsection 2(b), 15 U.S.C. 13(b), which provides:

> Nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor; . . .

and the cooperative exemption of Section 4 of the Act, 15 U.S.C. 13c, which provides:

> Nothing herein shall prevent a cooperative association from returning to its members, producers or consumers the whole, or any part of, the net earnings or surpluses resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

STATEMENT

This proceeding was originated by two separate Federal Trade Commission complaints against petitioners alleging violations of subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act [15 U.S.C. 13(f)], which bans the knowing receipt of unlawful price discriminations. During the early hearing stages, it was agreed by the parties that "these two proceedings be tried concurrently and considered as one case" (R. 92).[1]

Petitioners are two cooperative associations organized, existing and doing business under the laws of Tennessee and Mississippi, respectively, and their member independent jobbers engaged in the resale of automotive parts and

[1] All "R" references herein are to designated pages of the printed Transcript of Record in the Court of Appeals.

supplies in competition with chain stores, with the dealer organizations of automobile manufacturers, with oil and rubber companies, and with other jobber organizations in the automotive replacement market. Petitioners formed these cooperative associations in an attempt to achieve a degree of competitive equality with their larger, more aggressive, integrated rivals (see pp. 16-18, *infra*).

The purpose underlying formation of these associations was summed up by one witness:

> There are a lot of reasons why I joined Cotton States, but to sum it up briefly I would say I joined Cotton States to stay in business. The evolution in the automotive parts industry has brought about a condition that dictated that we either affiliate ourselves either through sale or part ownership or some other means with a chain and we have been approached on that, or align ourselves with someone that would enable us to stay in a competitive position and if we hadn't done that a good many years ago I believe we would have been out of business (R. 1042-1043).

At the time of organization of these cooperatives, and at the time complaint issued against petitioners, petitioners' suppliers made sales to all purchasers pursuant to openly published graduated-discount price schedules providing cumulative rebates geared to annual purchase volumes. These price schedules were available generally throughout the industry to all purchasers.

Petitioners' purchases were made by the cooperative associations, and earnings or surplus resulting from rebates for the annual purchases of the associations were distributed internally to individual member jobbers as patronage dividends. These dividends were proportionate to the amount of each member's purchases during the year. The earnings or surplus so distributed and received constitute the "discrimination" attacked in this proceeding (R. 99-100).

In 1938, these cooperative purchasing practices of petitioners were the subject of full investigation by the Federal Trade Commission. No action was taken by the Commission and petitioners "were given to understand that the file was closed" (R. 911).

The Commission's complaint against petitioners issued in May 1950, charging that petitioners, through receipt of cumulative volume rebates in 1949, had violated subsection 2(f) of the Clayton Act, as amended by the Robinson-Patman Act. Subsection 2(f) provides in relevant part:

> That it shall be unlawful for any person, engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price . . . .

On the same date, May 1, 1950, the Commission issued a series of complaints against petitioners' sellers, charging that the cumulative discount schedules violated subsection 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which bars discrimination in price between different purchasers of commodities of like grade and quality

> where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . .[2]

At the time of issuance of these complaints, neither the Commission nor any court had ever adjudicated the legality of these pricing practices. These Commission proceedings became known as the *Automotive Parts* cases.[3]

In 1953, this Court rendered its landmark decision in

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[2] This prohibition is not absolute, but is subject to a number of defenses and provisos, principal among which are the so-called cost justification and meeting competition defenses. 15 U.S.C. 13(a), (b). The Act also provides certain exemptions for cooperative associations.

[3] See footnotes 7-9, *infra*.

Automatic Canteen v. *Federal Trade Commission*, 346 U.S. 61, holding that subsection 2(f) did not reach the receipt of *every* price discrimination barred by the statute, but only those price discriminations "known [by the buyer] not to be within one of the [seller's] defenses", 346 U.S. at 74.

In June, 1953, following the Supreme Court's ruling in *Automatic Canteen*, the Commission consolidated both of these complaints for trial. 50 F.T.C. 952 (1954).

On October 7, 1954, Commission counsel closed the presentation of evidence in support of the complaint. Evidence was thereafter presented by petitioners in defense. Sixteen of petitioners' members testified that they were advised by all suppliers that the prices offered petitioners were cost justified or granted in good faith to meet the equally low price of a competitor. This testimony was uniformly corroborated by supplier witnesses. Hearings were concluded in December, 1957.

The Hearing Examiner's Initial Decision was entered on July 7, 1958 (R. 90-118). Ruling that evidence that petitioners relied upon supplier representations as to cost justification "must be rejected," the Examiner found that petitioners knew or should have known in 1949 that these prices were *not* cost justified because petitioners "knew the facts of life so far as the automotive parts market was concerned" (R. 112-13). "Furthermore," the Examiner found, "the jobber respondents [petitioners] were placed upon notice as to the illegality of price discriminations received through the medium of group-buying organizations, including Mid-South Distributors and Cotton States, Inc., by the initial decisions of the Hearing Examiners and the decision of the Federal Trade Commission and the Circuit Courts of Appeals in the following cases . . ." (R. 113). The decision then cited to the six *Automotive Parts* seller cases affirmed in the courts, 1955-1957. Conspicuously, the Hearing Examiner made no finding with respect to peti

buyers' knowledge of their sellers' meeting competition defense.

On February 24, 1959, the Commission entered its final decision, adopting the findings, conclusions, and order of the Hearing Examiner (R. 119-127). In an accompanying opinion, the Commission stated that the burden of the complaint included

> . . . a showing that the buyer knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless, induced or received the discriminatory prices (R. 123).

Rejecting the record evidence that petitioners were advised by their suppliers that their prices were cost justified—and again stressing the post-complaint findings of illegality in the *Automotive Parts* cases—the Commission found that petitioners' "trade experience" afforded the requisite statutory knowledge of the absence of cost justification.

The Commission also sought to correct the failure of the Initial Decision to make *any* finding as to petitioners' knowledge of their sellers' meeting competition defense. Rejecting the undisputed evidence that their suppliers regularly advised petitioners that prices were made to meet competition—and without citation to any contrary evidence—the Commission held that petitioners *knew* there could be no meeting competition defense because they *knew* that the prices were not cost justified, hence, "would not be lawful prices" (R. 125).[4] The Commission's ruling

[4] This finding as to buyers is ironic. In two early seller cases, the Hearing Examiner refused to impute such knowledge to the *sellers* themselves:

> "To say that Respondent, in 1949, knew its own discounts to be unlawful when complaint herein was not issued until a year later, and respondent is still contending its discounts to be lawful, and then to build on this basic fallacy the argument that it must therefore have known that a competitor with

thus nullified *Automatic Canteen's* holding that knowledge of the two defenses constituted *separate* proof elements.

Petition for review was filed in the Court of Appeals for the Fifth Circuit, under 15 U.S.C. 21, on July 6, 1959. On February 23, 1961, the Court of Appeals affirmed the Commission's order.

Initially, the Court defined the relevant area of competition as that between petitioners and

> (a) the large chain stores, the nationally integrated oil company and tire company outlets, and authorized dealers of the huge automotive manufacturers,

and

> (b) other independent individual jobbers who are neither within (a) nor a member of a Co-op buying group (p. 3a, *infra*).

The Court conceded the heavy competitive pressures which inspired the formation of petitioner association:

> Nothing is left to the imagination as to the origin of the Co-ops or the reasons for it. Petitioners' brief frankly states that they ". . . formed the cooperative associations . . . for the purpose of achieving a measure of competitive parity with their larger, more aggressive rivals . . ." meaning those in group (a) (p. 3a, *infra*).

But, said the Court, "not a word" was said by petitioners "about what happens to those in group (b)" who "will feel the pinch not only of the huge competitors in group (a) but that of [petitioners] as well" (p. 3a, *infra*).

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partially parallel costs must be charging similarly unlawful prices, not cost-justified because respondent's were not, is to pile inference upon inference. This contention is rejected." *E. Edelmann & Co.*, 51 F.T.C. 978, 997 (1955). *Accord, C. E. Nichoff & Co.*, 51 F.T.C. 1114, 1133 (1955).

As to *these* competitors, the Court said, the evidence was sufficient to show that petitioners had received illegal price discriminations:

> A Member-Jobber obtained substantially the same type and quantity of goods at a price substantially lower than his group (b) independent competitors. That hurt. That hurt the less-favored purchasers. It was that injury which Congress sought to prohibit (pp. 7a-8a, *infra*).

But this showing, the Court acknowledged, was only one "phase" of the Commission's burden of proof. Under *Automatic Canteen* the Court asserted,

> it is not sufficient merely to show the receipt of a price differential which likely would injure. . . . it is essential that the Commission go further and establish that the buyer had reason to know that the seller could not meet either [a cost justification or meeting competition] defense (p. 9a, *infra*).

The Court found both of these additional proof requirements met:[5] Order and shipments to petitioners "were handled exactly the same" as those to their independent jobber competitors; petitioners knew that "this procedure represented no real savings in cost to the seller." And "the co-ops were not formed to give suppliers an opportunity to meet competition with other suppliers," but to obtain for members a price not available outside the co-op, so petitioners could not urge that they were entitled "to assume that the supplier was extending such price differentials as a means for meeting competition with other suppliers" (pp. 10a, 13a, *infra*).

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[5] The Court failed to consider petitioners' contentions that the record must also show they knew that the price discriminations were injurious to competition and not within the statute's cooperative exemption (See pp. 16-18 and 22, *infra*).

Having affirmed the Commission's decision, the Court acknowledged the likely unfairness of its ruling. It concluded:

> If this is to entrench further the large chain-store automobile-gasoline-dealer competitors and aggravate, not lessen, the competitive disadvantage which these Member-Jobbers must bear, the result, if bad economics or bad social policy, is for Congress to change. Until that is done, one caught in the middle cannot, to ward off his huge and overpowering rival, injure, even unwittingly, a smaller one. When David slays Goliath no one else may be hurt. That is what the Commission determined was the result here (p. 14a, *infra*).

REASONS FOR GRANTING THE WRIT

Eight years ago, in *Automatic Canteen* v. *F.T.C.*, 346 U.S. 61, this Court firmly fixed standards governing liability of buyers for price discrimination under the Robinson-Patman Amendment to the Clayton Act. This petition raises fundamental first questions regarding the application of those standards in the Act's administration. If granted, the petition will present these important questions to the Court for the first time.

Misconstruing the controlling principles of *Automatic Canteen*, the Commission and the Court of Appeals have achieved a result directly contrary to Congress' purpose in enacting Robinson-Patman. Unless corrected, it will have far-reaching oppressive consequences upon the ability of small buyers, throughout the nation's economy, to compete in markets increasingly dominated by great rivals.

This Court has recently reminded that the Robinson-Patman Act was "motivated principally by Congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores." *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 544 (1960). The statute was designed to impede the coercive tactics of large buyers wielding heavy economic pressures

on their suppliers and to preserve the competitive vitality of smaller competing buyers "lacking the purchasing power to demand comparable advantages" and thus "at a hopeless competitive disadvantage." *F.T.C.* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959).

Petitioner cooperative associations were formed in an effort to achieve a measure of competitive parity with their larger, more aggressive, integrated rivals in the resale of automotive parts and supplies. Heavily disadvantaged by price concessions granted to chain stores, automobile dealers, and oil company and rubber company outlets, increasingly foreclosed by these competitors from their traditional position in the automotive parts after-market, petitioners sought through cooperative activity to obtain comparable bargaining leverage with suppliers (See pp. 17-18, *infra*).

This, classically, was the market imbalance at which the Robinson-Patman amendment to the Clayton Act was aimed. As construed by the Court below, however, the Act has now become a vehicle "to entrench further" these large competitors and to "aggravate, not lessen, the competitive disadvantage" which *petitioners* must bear.[6] Admittedly "bad economics" and "bad social policy", the decision flouts Congress' "rational basis" in enacting the legislation, *F.T.C.* v. *Simplicity Pattern Co.*, *supra*, at 68, and results in bad law as well.

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[6] *Cf.* Edwards, "The Price Discrimination Law—A Review of Experience", Brookings Institution (1959). In criticizing Commission enforcement of the statute after 25 years, Professor Edwards says:

> The law has curbed not only the practices of the powerful, but also the practices of others designed to furnish protection against the powerful. Flexible adjustments designed to give independent small concerns some of the buying advantages of chain stores have been struck down where . . . they gave associations of independent merchants power comparable to that of the great buyers. The capacity of the independent to protect himself has been weakened . . . (at p. 626).

With only faint deference to the letter of *Automatic Canteen*, the Court of Appeals substantially disregarded this Court's firm injunction that there must be a probing inquiry into the buyer's *knowledge* of illegality. The decision below exhumes a standard of illegality, expressly denounced in *Automatic Canteen*, which would leave the word "knowingly" almost entirely without significance in Section 2(f). 346 U.S. at 71. "We do not overwork a faithful figure", the Court of Appeals asserts, "to say that this is the other side of the [price discrimination] coin. For here it really is" (p. 1a, *infra*).

This oversimplification produces the Court's error. Subsection 2(f) does *not* simply reflect 2(a). 2(f) adds a fundamental new proof element: knowledge. Yet implicit in almost every line of the Court's decision—and of the decision of the Federal Trade Commission before it—is the equation of the *fact* of price discrimination with *knowledge* of that fact. The Court's final, painful apology ironically confirms its error. The Commission order is justified, says the Court, because "one caught in the middle cannot, to ward off his huge and overpowering rival, injure, *even unwittingly*, a smaller one." (p. 14a, *infra*, emphasis added) Yet it is exactly the *unwitting, unknowing* nature of petitioners' act which bars 2(f) liability.

Nor can such limitation on *buyer* liability in any way defeat the purposes of the Robinson-Patman Act nor inhibit the Commission in banning unlawful price discriminations where they occur. The Commission has plenary authority to halt injurious price discriminations by proceeding against the discriminating *sellers* under subsection 2(a)—as it has, in fact, done here. There is no purpose in antitrust policy for further oppression of small buyers "caught in the middle."

An understanding of the historical context in which this case arises is critical to a fair judgment. Petitioners are charged with knowingly receiving unlawful cumulative

volume rebates from their suppliers in 1949. At the time of issuance of the Commission's complaint, these price schedules were traditional throughout the automotive parts industry; they had never been adjudged illegal nor, in fact, challenged by the Commission. Petitioners' purchasing practices had, however, been investigated by the Federal Trade Commission some ten years before. No action was taken and petitioners "were given to understand that the file was closed" (R. 911).

With the complaint against petitioners, complaints were also issued against several of petitioners' suppliers charging unlawful price discrimination in the use of these pricing schedules. A number of similar complaints were issued against other suppliers in succeeding years.

Litigation of petitioners' case was suspended pending disposition of the seller cases, which were fiercely litigated before the Commission and in the Courts over a number of years. All suppliers defended on grounds that the price differentials had not caused competitive injury. The suppliers defended, as well, on grounds that the price differentials were either cost justified or granted in good faith to meet competition, or both. These defenses were rejected by the Commission,[7] one Commissioner, however, strenuously dissenting in four cases on grounds that no injury had been established.[8] The Commission's orders

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[7] In two seller cases, however, the Hearing Examiner upheld evidence of cost justification. *C. E. Nicholl & Co.*, 51 FTC 1114, 1138 (1955). *Thompson Products, Inc.*, 1959 CCH Transfer Binder, Par. 27,841. In *Thompson*, after modifying the order, the Commission adopted the Initial Decision.

[8] *Moog Industries, Inc.*, 51 F.T.C. 931, 951 (1955); *P & D Manufacturing Co.*, 52 F.T.C. 1155, 1175 (1956); *P. Sorensen Manufacturing Co., Inc.*, 52 F.T.C. 1659, 1673 (1956); *Whitaker Cable Corp.*, 51 F.T.C. 958, 977 (1955).

were ultimately affirmed in the Courts of Appeals in the years 1956 to 1959."

Subsequent to the first Commission rulings in the seller cases, the trial of this case was resumed; but the shadow of the seller cases thereafter fell heavily on every stage of the proceeding. Stripped of its elaborate ratiocination, the decision of the Court of Appeals—like the decision of the Commission and of the Hearing Examiner before it says simply this: If a seller is held liable for price discrimination, his favored buyers *must* also be liable.

According to the logic of the Court and the Commission, these buyers had the clairvoyance to know in 1949 that the prices they received had a tendency to injure competition, were not cost justified and were not made to meet competition, *despite* the fact that for the next ten years there was fierce disagreement over these difficult questions of law among the most sophisticated antitrust authorities.

Yet this history is of no account either to the Court of Appeals or to the Commission. They would still charge these local businessmen, untutored in the intricacies of antitrust, with guilty prescience, a year before the prices were first challenged by the Federal Trade Commission, six years before the first Commission ruling, seven years

" *Standard Motor Products* v. *F.T.C.*, 265 F. 2d 674 (2nd Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *P. Sorenson Mfg. Co.* v. *F.T.C.*, 246 F. 2d 687 (D.C. Cir. 1957); *P & D Mfg. Co.* v. *F.T.C.*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958), *rehearing denied*, 356 U.S. 905 (1958); *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied* 353 U.S. 938 (1957), *rehearing denied*, 353 U.S. 962 (1957); *C. E. Nichol & Co.* v. *F.T.C.*, 241 F. 2d 37 (7th Cir. 1957), *modified* 355 U.S. 411 (1958), *rehearing denied*, 355 U.S. 968 (1958); *Moog Industries* v. *F.T.C.*, 238 F. 2d 43 (8th Cir. 1956), *affirmed* 355 U.S. 411 (1958), *rehearing denied*, 356 U.S. 905 (1958); *Thompson Products, Inc.*, 1959 CCH Transfer Binder, Par. 27,841.

before the first Court of Appeals ruling, and nine years before they were ultimately laid to rest by this Court.

The Errors in the Court of Appeals Decision

The Court of Appeals has committed four fundamental errors in finding the statute's required proof of knowledge. Each is sufficient to invalidate the Court's decision.

(1) The Failure to Consider Whether Petitioners Knew the Price Differentials Injured Competition

The Court failed entirely to consider, as required by *Automatic Canteen*, whether petitioners knew that they were receiving "prohibited discrimination in prices," i.e., one which had the adverse competitive effect proscribed by the statute. "So far as the specific element of discriminatory injury is concerned," the Court stated,

> the government's § 2(f) burden of proof is satisfied by showing price differentials of a kind which would cause or likely cause injury to competitors. . . . This phase is not bound up with the buyers' *knowledge* that the seller would be unable to justify the differential (p. 8a, *infra*, emphasis in original).

This is clear error. Prior to any inquiry with respect to the buyer's knowledge of the seller's justification, *Automatic Canteen* compels an inquiry into the buyer's knowledge that the price differential was an injurious one. This construction of *Automatic Canteen* was frankly acknowledged by the Commission itself in holding that before it reached questions of justification, the Commission must show that "the buyer knew of the price differentials *and of their probable competitive effect*" (p. 18a, *infra*, emphasis added). Had the Court of Appeals made such inquiry, it would have found that the record does not permit the *remotest* inference that petitioners *knew* that the prices received by them had a competitive effect condemned by the statute, or any injurious effect; petitioners *hoped* that they might be able to compete more effectively

through their cooperatives with their larger, more aggressive, and more favored competitors.

In fact, despite the Court of Appeals' deep solicitude for the plight of petitioners' "group (b)" competitors—the independent jobber not affiliated with a cooperative—the record is almost totally silent either as to the actual existence of such competitors or the effect of the challenged price discriminations upon them. In this 1300 page record, the *only* testimony adduced with respect to independent jobbers was the testimony of three such witnesses covering 17 pages (R. 168-173, 788-796, 827-831). These jobbers did not testify as to which, if any, of the 24 petitioners they competed with, nor was there testimony elsewhere in the record as to whether there were *any* other independent jobbers actually competing with petitioners. The record, on the other hand, abounds with evidence of the virulence of the competition of petitioners' larger "group (a)" rivals.

But even assuming that these three jobbers were representative of a class of independent jobbers in competition with petitioners, and that they had been seriously disadvantaged by their inability to obtain top-volume rebates on their suppliers' pricing schedules, there is no basis in this record for finding that they were injured by *petitioners'* purchasing practices. In the context of this industry, the inference is far more logical that they, like petitioners, were hurt by the buying practices of their larger, integrated competitors against whom petitioners were reacting. *Cf. Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 250 (1951).

The record shows that petitioners' single purpose in organizing the cooperatives was to enable them to purchase from their suppliers on terms more nearly equal to the favored terms received by competitors such as automobile dealer organizations, chain stores, and oil and rubber company outlets. It is self-evident that members of *any*

cooperative are similarly motivated. Typically, representatives of petitioners testified:

> If we hadn't [formed the association] a good many years ago I believe we would have been out of business (R. 1043).
>
> We were faced with competition from a company considerably larger than we were, that was in a position to buy merchandise cheaper than we were . . . and . . . in order to offset that competition and to operate on an even basis some organization was necessary . . . (R. 278).
>
> [It was a] means for all of us to stay in business. We just had to have some way of meeting that competition (R. 953).

The record shows that the true competitors of petitioners were larger, stronger, more aggressive, more prosperous, and the beneficiaries of more favorable prices and greater discounts from automotive parts suppliers. The record describes a harsh struggle for survival by petitioners in a market which had increasingly become dominated by large, integrated buyers able, apparently without legal barrier, to obtain deep price concessions from their suppliers. Witness after witness testified to these oppressive competitive conditions (see, e.g., Shipp, R. 237; Fife, R. 695; Anderson, R. 713; Taylor, R. 779-91, 833, 839, 846; Ginsburg, R. 794; Griener, 803-804; Robinson, 948-949; Gates, 965; Hamil, 1136-1141). The only "probable competitive effect" known by petitioners to flow from the prices they received through the association was the hope that they might survive competitively in the face of severe competition from larger buyers.

(2) The Evidence With Respect to Petitioners' Knowledge of Cost Justification

The Court of Appeals erred in finding that petitioners knew that the prices they received were not cost justified; the finding is directly contrary to *all* evidence of record. The Court has failed to make that "fair assessment" of the whole record which would limit interposition of

this Court's supervisory authority. *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, 401 (1958); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491 (1951).

The Court's decision is based upon its finding that "for all practical purposes, the orders and shipments to petitioners were handled exactly the same [as sales to independent jobbers] . . . . The buyer knew that this procedure represented no real saving in cost to the seller." This finding adopted the substance of the Commission's earlier finding "that trade experience in a particular situation can afford a sufficient degree of knowledge," (R. 123) which in turn finds its roots in the statement of this Court in *Automatic Canteen* that

> Trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer, can fairly be charged with notice that a substantial price differential cannot be justified (346 U.S. at 79).

But this uncritical attempt to blanket the facts of this case into the "trade experience" dictum of *Automatic Canteen* cannot withstand scrutiny.* The record elaborately discloses that petitioners had every reason to believe that a substantial cost saving accrued to their suppliers. Every jobber witness testified that petitioners were regularly advised by their suppliers that the prices granted them were justified by promotional, selling and administrative savings to them, and this testimony was uniformly corroborated by supplier witnesses. These witnesses were subjected to searching cross-examination by Commission counsel in an effort to force them to relinquish their view; yet uniformly they held firm to their conviction that the prices were cost justified (e.g., R. 877-878, 254-255, 279, 989, 1135-1137).

But the evidence was not limited simply to a recount of claims of cost justification by sellers. Petitioners' wit-

nesses detailed in length the *types* of cost savings which they believed their operations permitted, repudiating the Court's finding that they knew that there could be "no real saving in cost" to their suppliers. In Appendix D of this petition, we have excerpted representative testimony to show the breadth and detail of this evidence. None of this evidence was disputed by Commission counsel, nor was contrary evidence adduced. And petitioners had every reason to place reliance upon their suppliers' representations; they were not bound to assume that their suppliers were wrongdoers. *U. S.* v. *Detroit Timber and Lumber Co., et al*, 200 U.S. 321, 331 (1906).

Moreover, either through error or oversight, the Court's decision mistakenly asserts that:

> the record actually contains positive evidence that at least three of the major suppliers acknowledged [at trial] that they could not justify the price reductions on the basis of lower costs (pp. 11a-12a, *infra*).

This finding—upon which the Court laid primary stress—is inexplicable. The record contains no such evidence. Supplier witnesses in this case *refused* to renounce their previously held views that the prices were cost justified (see e.g., R. 1135-1141), and every supplier or jobber witness so questioned testified that he *still* believed the prices cost justified (see Appendix D, p. 22a, *infra*).

(3) The Evidence With Respect to Petitioners' Knowledge of Meeting Competition

The Court of Appeals disregarded the uncontroverted record evidence showing petitioners' reason to believe that the prices received were within the sellers' meeting competition defense, solely on the ground that initiative in price negotiations was ordinarily taken by petitioners. The Court said:

> A buyer earnestly negotiating with a supplier to obtain from such supplier the benefit of that supplier's volume discount tables already in effect can certainly not urge that he was entitled to assume that the

supplier was extending such price differentials as a means of meeting competition of the other suppliers (p. 13a, *infra*).

This same contention was rejected by this Court in *Automatic Canteen* where it refused to put the buyer "at his peril whenever he engages in price bargaining." 346 U.S. at 73. Moreover, the record is clear that there was no simple *assumption* by petitioners; the record shows their continuing reason to believe the existence of such justification. And even this standard is too strict. Petitioners need not show that they *affirmatively* knew the sellers could justify on the basis of meeting competition defense. The record need only show, despite the Court of Appeals' disparagement of *Automatic Canteen's* "awkward double negatives" (p. 13a, *infra*), that they did not know that the defense was *not* available. 346 U.S. at 74.

Once again, the Court of Appeals has failed to make a "fair assessment" of the record on this element of proof. *F.T.C.* v. *Standard Oil Co.*, *supra*. The suppliers' testimony shows that they repeatedly advised petitioners that their prices were made to meet competition with other sellers (R. 690-692, 717, 728-729, 933-936, 975-976, 1012), and petitioners uniformly testified that they were so advised. Moreover, the Commission's own action, in bringing multiple cases against petitioners' suppliers challenging the *same* pricing systems clearly demonstrates the existence of such prices generally in the industry and strongly supports an inference that, so far as petitioners knew, the prices *were* being offered by these suppliers to meet competition. Not until the ultimate affirmance of the *Automotive Parts* cases in the courts in the years 1956 to 1959 was the availability of the defense under such circumstances *finally* decided.[10] But the fact that at a much later date, in a series of sharply litigated cases, the prices were held not to be within the sellers' defense is wholly irrelevant to

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[10] See e.g., *Edelmann* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956); *Standard Motor Products* v. *F.T.C.*, 265 F. 2d 679 (2nd Cir. 1959).

the question of petitioners' knowledge of this fact 8 to 10 years earlier.

(4) The Failure to Consider Whether Petitioners Knew the Prices Were Not Within the Cooperative Exemption

The Court of Appeals erred in failing to consider petitioners' contention that they did not know that the prices received were *not* within the seller's cooperative exemption. Section 4 of the Robinson-Patman Act provides that:

> Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Before the Commission and the Court of Appeals, petitioners strenuously urged that the pricing practices challenged were exempt under Section 4. We do not here press that contention beyond its inclusion as an element demonstrating petitioners' lack of knowledge of illegality. The record shows that petitioners were organized as nonprofit cooperative associations under applicable state law, and their corporate charters consistent with Section 4 explicitly provide that the association "will return to its members the whole of the net earnings or surplus resulting from its trading operations in proportion to their earnings from, to, or through the association" (R. 677). The record also shows that subsequent to the enactment of Robinson-Patman, the Federal Trade Commission investigated the operations of petitioners and closed the file without action (R. 911). Petitioners had every reason to believe that their activities *were* within the cooperative exemption—the fact that the Court of Appeals ten years after the event held the contrary is irrelevant—and the Court erred in not so finding.

CONCLUSION

The decision of the Court of Appeals conflicts with the basic legislative aims of the statute and undermines this Court's decision in *Automatic Canteen* v. *F.T.C.* It raises a question of primary significance in the administration of this important antitrust law not previously ruled upon by this Court. We urge that this petition for a writ of certiorari be granted.[11]

Respectfully submitted,

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[11] This is the second petition for a writ of certiorari to reach the Court this term challenging a Federal Trade Commission order under subsection 2(f) of the Robinson-Patman Amendment to the Clayton Act. See *American Motor Specialties* v. *F.T.C.* (No. 368), 278 F. 2d 225 (2nd Cir. 1960), *cert. denied* 364 U.S. 884 (1960). While the *American Motor* petition raised a question with respect to whether the Commission had met its burden of proof under 2(f), it was only one of five major questions presented, the others relating to such disparate issues as failure to allege interstate commerce, conflict with the New York Cooperative Corporations Law, and incompetence of certain documents admitted into evidence. Moreover, the questions presented here raise different substantive issues from *American Motor Specialties*, and petitioners' citations of error there were wholly different from those urged here.

Of course, a denial of a petition for writ of certiorari "imports no expression of opinion upon the merits of the case, as the Bar has been told many times." *U. S.* v. *Carver*, 260 U.S. 482, 490 (1923). See also *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-920 (1950).